Supreme Court, U.S.
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In The

Supreme Court of The United States

October Term, 1994

IRVING HOCHBERG, MARTA KLAJMAN, SHELLEY SCHEFFLER, FIRST CHURCH OF CHANGO, INC., individually and on behalf of all members of the FIRST CHURCH OF CHANGO, INC.,

Petitioners,

- against-

MAYNARD HOWLETT, EMANCIPATION, and CULT AWARENESS NETWORK, NY-NJ, C.F.F., INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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68pp

Questions Presented

1. Is the fundamental right of a dissident Plaintiff association to enforce its First Amendment protections on behalf of its members by class action (brought to preserve the members' anonymity against victimization by co-conspirator Defendants) abridged or chilled by a Discovery Order to divulge all the identities of its members under pain of dismissal? Does membership disclosure abridge the right to sue in such cases?

2. Was it a failure of due process to require a dissident Plaintiff association to establish more than the circumstantial "possibility" of a conspiracy to defeat Summary Judgment before the completion of discovery?

3. What is the appropriate standard to be applied to discovery issues in such actions to enforce Constitutional protections?

4. Did the actions of the Court of Appeals in affirming the District Court's disclosure of member identity and requiring more than the circumstantial possibility of conspiracy to defeat Summary Judgment prior to discovery completion, conflict with decisions of this Court and sanction a departure by the District Court from the accepted and usual course of judicial proceedings?

PARTIES IN THE COURT BELOW

Irving Hochberg, Marta Klajman, Shelley Scheffler and the First Church of Chango individually and on behalf of all other members of the First Church of Chango were Plaintiff-Appellants in the Court below.

Maynard Howlett and Cult Awareness Network, NY-NJ, C.F.F., Inc., were Defendant-Appellees. [1]

Emancipation, originally cited in the Court below as a Defendant, was found to be merely a fictitious and assumed name employed by Defendant Howlett.

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[1] The District Court granted Summary Judgment before the completion of discovery in favor of Respondent Cult Awareness Network, NY-NJ, C.F.F., Inc. on November 30, 1992. Permission to enter the judgment as a Final Order for appeal purposes was refused. The District Court dismissed the complaint against Respondent Howlett on May 3, 1994, as a sanction for non-disclosure of membership lists.

TABLE OF CONTENTS

Page

Questions Presented 1

Parties in the Court Below 2

Table of Authorities 6

Opinions Below 8

Jurisdiction 9

Statues Involved 10

Statement of Case 10

A. Background 10

B. Victimization of Petitioners 12

C. Federal Jurisdiction in the District Court 14

D. Procedural Summary - Discovery 14

Reasons for Granting the Writ 17

Question 1:

The Dilemma;
Membership Disclosure of
Dissident Plaintiff Associations
Abridges and Chills the Right to
Enforce Constitutional Protections 17

The Case;
Discovery of Membership
Lists in Conflict with *NAACP v.*
Alabama 357 US 499 17

Ripeness of the Case;
Constitutional Protections
of First Amendment in
Church Lukumi v. Hialeah 113 S. Ct.
2217 Abridged by Discovery of All
Identities of Members 21

Question 2: Conspiracy and Discovery;
Opportunity to Obtain Non-Circumstantial
Evidence Stifled 22

Standard Required of Petitioners to
Defeat Summary Judgment Before
Discovery Completion in Conflict
with Decision in *Adickes v.*
S.H. Kress & Co. 398 US 144 24

Certiorari Appropriate; Major
Departures on Discovery Issues
Renders Enforcement of Constitutional
Protections ineffective 27

Conclusion 29

Appendix:

Order on Reargument
filed on April 28, 1995 . . . . . A1

Order on the Appeal
filed on February 15, 1995 . . . . . A3

Opinion and Order
dated April 28, 1994 . . . . . A7

Opinion and Order
dated January 10, 1994 . . . . . A17

Opinion and Order
dated November 30, 1992 . . . . . A23

TABLE OF AUTHORITIES

PAGE

CASES:

Action v. Gannon, 450 F.2d 1227 (CA 8th) 14

Adickes v. S.H. Kress & Co., 398 US 144 22,23,24,27

Celotex Corp. v. Catrett, 106 S.Ct. 2584 25

Church Lukumi v. Hialeah, 113 S.Ct. 2217 11,18,21,28

Ferguson v. Omnimedia Inc., 469 F.2d 194 . . . 23,24

Griffin v. Breckenridge, 403 US 88 14

Mabey v. Regan, 537 F 2d 1036 24

NAACP v. Alabama, 357 US 449 17,18,19,22

Slalina v. William Penn Parking Corp.,
106 F.R.D. 419 (W.D. PA. 1984) 15-16

STATUTES AND RULES;

First Amendment to the
US Constitution 10,13,19,21-22,27,29

Fifth Amendment to the US Constitution 22

Fourteenth Amendment to the US Constitution 14

28 USC 1254 (1) 9

42 USC 1985 (3) 14

Local Rule 2 of the Civil Rules of the
United States District Court for the
Southern District of New York 10,14,23,24,27

Local Rule 46 (A) of the Civil Rules of the
United States District Court for the
Southern District of New York . . . . . 20 FN 6

WRITERS;

Alexis de Tocqueville, "Democracy in America"
Part II, Book 1, Ch. 17 28

No.

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SUPREME COURT OF THE UNITED STATES
October Term 1994

IRVING HOCHBERG, MARTA KLAJMAN
SHELLEY SCHEFFLER, FIRST CHURCH
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individually and on behalf of all members of the
FIRST CHURCH OF CHANGO

Petitioners,

- against -

MAYNARD HOWLETT, EMANCIPATION CULT
AWARENESS NETWORK, NY-NJ, C.F.F., INC.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The Summary Order of the United States Court of Appeals for the Second Circuit filed on February 15, 1995 affirming the Order of the District Court in granting Summary Judgment to Respondent Cult Awareness Network, NY-NJ, C.F.F., Inc. and dismissing Petitioners' case against Respondent Howlett as a sanction for non-disclosure of membership lists is unpublished and not reported. (Both

publication and citation are prohibited). It is reproduced in the Appendix to this Petition at Pages A3 - A6.

The Opinion and Order of the District Court awarding Summary Judgment in favor of Respondent Cult Awareness Network, NY-NJ, C.F.F., Inc. filed on November 30, 1992 is unpublished and is reproduced herein at Pages A23 - A38.

The Opinion and Order of the District Court denying class certification, filed on January 10, 1994, is unpublished and is reproduced herein at Pages A17 - A22.

The Opinion and Order of the District Court dismissing Petitioners' case against Respondent Howlett as a sanction and denying the Petitioners' Motion for Certification of issues for Interlocutory Appeal, filed May 3, 1994, is unpublished and reproduced herein at pages A7 - A16.

A Petition to the Court of Appeals for Rehearing containing a suggestion that the case be re-heard in banc was denied by notice filed on April 28, 1995. A copy of the Notice is reproduced in Page A1-A2 hereto.

JURISDICTION

1. Petitioners seek review of the Summary Order of the U.S. Court of Appeals, Second Circuit, which was entered on February 15, 1995.

2. The Court of Appeals denied rehearing containing a suggestion of rehearing in banc on April 28, 1995.

3. This Court has jurisdiction to review the Summary Order in question by writ of certiorari pursuant to the provisions of 28 USC 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 1 to the Constitution of the United States.

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances."

Local Rule 2 of the Civil Rules of the United States District Court for the Southern District of New York:

"A party shall furnish to any other party, within five (5) days after a demand, a verified statement setting forth said party's post office address and residence, and like information as to partners if a partnership is involved and, if a corporation or an unincorporated association, the name, post office addresses and residences of its principal officers. In case of an assigned claim, the statement shall include the post office address and residence of the original owner of the claim and of any assignee. Upon non-compliance with the demand, the court, on ex parte application, shall order the furnishing of the statement, and in a proper case, on motion, may direct that the proceedings on the part of the non-complying party be stayed, or make such order as justice requires."

STATEMENT OF CASE

A. Background

Individual Petitioners are members of Petitioner Church which practices the Santeria religion, an Afro-Caribbean theology which originated as a result of the

enslavement and transportation to the Americas of hundreds of thousands of members of the Yoruba people of Africa. See the opinion of this Court in:

Church of Lukumi v. Hialeah 113 S.Ct. 2217 at 2222-2223.

In order to avoid persecution and suppression of the traditional African religion of Yoruba by slave owners, Yoruba deities and spirits were secretly worshiped during forced participation in Catholic ceremonies.

The resulting Santeria religion was born out of resistance to the enslavement of the spirit as well as the body.

Today, over 100 million people practice the Santeria religion in South America and the United States.

The Yoruba religious practice of animal sacrifice during certain Santeria ceremonies has, however, engendered widespread public outrage and persecution in the United States.[2]

Petitioner Church is small and consists of no more than twenty-two members.

The long history of persecution of adherents of the

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[2] During the proceedings in the District Court, named Petitioner Shelley Scheffler, was accosted in the street by individuals screaming anti-Santeria epithets, on the day in which the U.S. Supreme Court's decision extending First Amendment rights to the Santeria religion in Church of Lukumi v. Hialeah 113 S.Ct. 2217 was published by the New York Times.

Santeria religion has led to the tradition of secrecy in the practice of its religious ceremonies and the identity of its members.

Respondent Cult Awareness Network, NY-NJ, C.F.F., Inc., (herein after referred to as Respondent CAN) is a local affiliate of a national organization which monitors the harmful effects of mind control used by perceived destructive cults. The record reflects that it also conducts de-programming of former cult members and is alleged to support violent kidnaping to effect such de-programming activities. It has a New Jersey address and is the only one of its type which operates in the New York-New Jersey area where Petitioner Church members and Respondent Howlett reside respectively.

Respondent Maynard Howlett is a retired school teacher and admitted counselor of an ex-member of Petitioner Church prior to the events complained of. At the time of the action he resided in Montclair, New Jersey which has the most active cell of Respondent CAN in the New York-New Jersey area.

B. Victimization of Petitioners

In March of 1991, the first of 21 anonymous letters were sent to ten members of Petitioner Church. The letters contained threats to the members of unspecified District Attorney investigations, IRS tax audits and threats to professional licenses and livelihoods if the members continued to follow the Santeria religion. The Santeria religion and individual Petitioners were vilified in the said letters.

In April, 1991, Respondent Howlett applied for a P.O. Box under the assumed name of "Emancipation" and

requested on the application that his address not be divulged.

In April through June of 1991, the remainder of the 21 anonymous letters (of similar form and content) were received by the said ten Church members. Certain of the letters now contained Respondent Howlett's P.O. Box Number with requests to contact it.

During August to October, 1991, Petitioner Klajman's business premises were disrupted by persistent hoax telephone calls to the New York Police and Fire Departments.

During October of 1991, the same ten members who received the 21 anonymous letters also received anonymous packages containing Cult Awareness Network local affiliate brochures and anti-Santeria material.

A 138-page Manual of Surveillance available to Respondent CAN members (and prepared by a then member of Respondent CAN) recommended the use of mailing campaigns with P.O. Boxes under assumed names and threats of IRS complaints against perceived cults and their members.

Petitioners instituted suit in the District Court (S.D.N.Y.) in March 1992 for violations of their First Amendment rights to freedom of religion and a permanent injunction restraining Respondents (brought as a class action) and for libel.

Class certification was premised on the special need of all the Church members for protection.

A conspiracy to violate the said constitutional protections was alleged to exist to which Respondent CAN and Respondent Howlett and others were parties.

C. Federal Jurisdiction in the District Court

Petitioners relied upon the provisions of 42 USC 1985 (3) for subject matter jurisdiction in the District Court.

42 USC 1985 (3) was introduced at the 42nd Congress and was originally a criminal provision penalizing conspiratorial acts done with the intent to violate Constitutional rights and privileges.

42 USC 1985 (3) also provides compensatory relief for private conspiracies to deprive a person or class of persons of equal protection of the laws. See: *Griffin v. Breckenridge*, 403 US 88 at 99-100.

The source of Congressional power to create a right of compensation for private conspiracies to violate First Amendment rights of freedom of religion is found in Section 5 of the Fourteenth Amendment to the U.S. Constitution. See: *Action v. Gannon*, 450 F.2d 1227 (CA 8th).

D. Procedural Summary - Discovery

On May 19, 1992, the District Court refused to order the disclosure of the identities of the officers of Respondent CAN to Petitioners, as provided for by Local Rule 2, though a proper formal demand and motion to compel were made.[3] (The District Court, at a later stage of proceedings, ordered Petitioners to disclose the identities of all members of Petitioner Church to Respondent Howlett under pain of dismissal).

The District Court refused a continuance of

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[3] See page 10 for the text thereof.

Respondent CAN's Summary Judgment proceedings of October 1992, to allow Petitioners to trace and depose a material witness, whose whereabouts Respondent Howlett refused to reveal, on his attorney's orders, at his Deposition two weeks prior to oral argument on Summary Judgment. Summary Judgment in favor of Respondent CAN was granted before completion of Discovery. Entry of the Summary Judgment as a Final Order for the purposes of an immediate appeal was refused by the District Court.

Petitioners made full disclosure within the first five months of filing their claim in March 1992 and produced in August, 1992, a 62-page production of documents relevant to their case, copies of all such documents, supplied a list of 39 persons with possible knowledge or information of their case and supplied inter alia copies of the original envelopes in which the 21 threatening letters were sent to the ten Church members. Though the envelopes contained the names and addresses of the ten members in question, neither Respondent took any steps to take statements, conduct depositions or in any way utilize this discovery.

Despite this Respondent Howlett demanded discovery of all the identities of the members of Petitioner Church. The extent of Petitioners' discovery was misrepresented by Respondent Howlett before the District Court and Court of Appeals. (See page 20, footnote No. 6 infra.).

In November, 1993, the District Court heard concurrent oral argument on Petitioners' Motion for a Protective Order against divulging the identities of all Church members to Howlett and Petitioners' Motion for Class Certification. Both Motions were premised on the same special need to protect the Church membership from the risk of further acts of harassment which identity disclosure could lead to. See, for class certification protection: *Slalina v.*

William Penn Parking Corp. 106 F.R.D. 419 (WD PA. 1984).

At the conclusion of oral argument the District Court denied a Protective Order and ordered the disclosure of the identities of all Church members to Respondent Howlett under pain of dismissal. The District Court, however, reserved judgment for several months on the issue of Class Certification before ultimately denying it on January 10, 1994.[4]

A subsequent motion by Petitioners for certification of an interlocutory appeal against disclosure of Church members' identities was denied and Petitioners' remaining case against Respondent Howlett was dismissed as a sanction for non-disclosure in May, 1994.

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[4] The Opinion and Order of the District Court denying class certification incorrectly states that Respondent Howlett's representative, Graham Berry, Esq., (who also represented the Executive Director of the National Body of CAN in an unrelated proceeding at the same time and who was a personal friend of a material witness, whose whereabouts he ordered Respondent Howlett not to disclose) no longer represented Respondent Howlett.

The record in the case reflects, however, that by agreement between Mr. Berry and Roseman & Colin (Respondent Howlett's pro bono attorneys), Mr. Berry continued to be his representative on an 'of counsel' basis. This is reflected in the affidavit in support of the substitution order signed by the District Court on August 20, 1992. The record reflects that copies of all correspondence in the case were copied to Mr. Berry thereafter.

THE REASONS FOR GRANTING THE WRIT

QUESTION 1:

The Dilemma; Membership Disclosure of Dissident Plaintiff Associations Abridges and Chills the Right to Enforce Constitutional Protections

A dissident plaintiff association which seeks to protect its members from victimization by the anonymity of class action enforcement of Constitutional protections may be compelled to disclose all the identities of its members to the alleged harassers by discovery procedures.

Threat of disclosure of all such identities in proceedings to lawfully enforce such Constitutional protections effectively deters and chills the fundamental right of enforcement.

Dissident/controversial organizations which enrage public sentiment and are the victims of unconstitutional actions and harassment, suffer an effective abridgement and chilling of the fundamental rights to enforce constitutional protections due to the prevalence of discovery orders requiring disclosure of their membership lists.

Membership disclosure orders against Plaintiffs in such cases are inappropriate and defeat the purposes of such litigation.

The Case: Discovery of Membership Lists in Conflict with NAACP v. Alabama 357 US 499

The history of persecution of the Santeria religion engendered a tradition of secrecy with regard to religious ceremonies and the identity of adherents.

It was not controverted that Petitioner Church had engendered widespread public outrage by animal sacrifice practices.

Reprisals in the form of the above mentioned anonymous threatening letters and CAN brochures were directed at ten known members of Petitioner Church.

Petitioner Klajman's business premises were the target of false and anonymous call to the NYC Police and Fire Departments.

While this case was before the District Court, Petitioner Scheffler was accosted by Santeria opponents on the day this Court's decision extending First Amendment rights to the Santeria religion (*Church of Lukumi v. Hialeah* 113 S.Ct. 2217) was published in the New York Times.

This Court in 1958, addressed the chilling effects of disclosure of membership lists of a then dissident and controversial defendant association on the freedom of association and the right to pursue the beliefs which the association had the right to advocate.

See:

NAACP v. Alabama, 357 US 449 at 462 to 463 where this Court held that where there is uncontroverted evidence of public hostility, and reprisals against known members in the past, such disclosure should not be permitted against a Defendant if discovery rights were otherwise recognized. The core concern of this Court in the NAACP case was freedom of association.

Neither the Plaintiff Alabama nor its legal

representatives were allowed access to the NAACP membership lists.

The Court of Appeals, in the present case, declined to extend or apply the *NAACP v. Alabama* decision to the circumstances of the present case where the core concern is not focused on freedom of association of a Defendant (as in the *NAACP v. Alabama* case) but on the de facto abridgment of the fundamental rights of a dissident Plaintiff to enforce by lawsuit, the protections of the First Amendment of freedom of religion.[5]

In the present case, it is argued that disclosure of membership lists chills the fundamental right to enforce constitutional protections and thus effectively abridges such protections.

The Court of Appeals' refusal to extend or apply this Court's decision in *NAACP v. Alabama* to the present case, conflicts with the decision in NAACP v. Alabama since freedom of association is the corollary of an unabridged right to enforcement of constitutional protections. Both are different aspects of the same issue.

There can be no true right or protection without an effective remedy. (*UBI, Remedium, IBI IUS*).

As indicated above, Petitioners recognized Respondents' discovery rights and made extensive discovery within the first five months of initiating their action in the

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[5] Though the case of NAACP v. Alabama, supra was argued before the Court of Appeals, the Summary Order of that Court of February 15, 1995 passes over this issue and makes no reference to it.

District Court.[6] In moving for an interlocutory appeal against disclosure of members' identity, Petitioners requested a stay on this disclosure issue only.

It was inequitable for the District Court to require Petitioners to disclose members' identities under penalty of dismissal whilst at the same time reserving its decision on class certification (premised on the same special need of the members for anonymity) for several months. In effect, the District Court sought to force Petitioners, under pain of dismissal, to render their own motion for class certification moot.

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[6] The District Court's opinion and order of May 3, 1994, dismissing Petitioners' action against Respondent Howlett is incorrect where it is stated (A-8) that Petitioners only disclosed the 21 threatening letters. The record of the case reflects the contrary. This error was based on a misrepresentation by Respondent Howlett's counsel and repeated before the Court of Appeals; it was also misrepresented before both Courts that Petitioners had also failed to respond to interrogatory requests. This was similarly untrue. The record reflects that interrogatory request was fully responded to on August 9, 1992, with the exception of questions not complying with Local Rule 46 (a) of SDNY.

The District Court's order also fails to indicate that it was only when an amended notice of Petitioners' depositions was served with a schedule outlining the scope of questions to be asked (and not previously served) that Petitioners objected and sought a protective order. This is reflected in the record of the case.

The transcript of oral argument for a protective order does not support the District Court's contention that it denied a request for certification of an interlocutor appeal on November 3, 1993 (A-10,A-13,A-14) The transcript shows that an adjournment was denied to prepare such a request. A request for an interlocutor appeal was filed on December 24, 1993 (11 days after the District Court's discovery order) and denied on May 3, 1994.

Disclosure of the members' identities under discovery would automatically destroy the anonymity basis of class certification and expose the entire membership to the risk of reprisals.

The Court of Appeals' sanctioning of the District Court's approach to the above issues conflicts with this Court's approach in *NAACP v. Alabama*, supra, and constitutes a departure from the accepted and usual course of judicial proceedings, requiring this court to exercise its power of supervision.[7]

RIPENESS OF THE CASE; Constitutional Protections of First Amendment in Church Lukumi v. Hialeah 113 S.Ct. 2217 Abridged by Discovery of All Identities of Members.

This case is especially ripe for a grant of certiorari on the de facto abridgement by discovery of the fundamental right to enforce constitutional protections in light of this Court's recent decision specifically extending the protection of the First Amendment to the Santeria religion in:

Church Lukumi v. Hialeah, 113 S.Ct. 2217

Due to the Santeria religion's requirement of secrecy with regard to ceremonies and adherents, the Court's recognition of the right of its adherents to enforce First Amendment protections has, in effect, been rendered nugatory in the light of disclosure orders to divulge adherents' identities.

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[7] The District Court's conduct was sanctioned by omission, as the Court of Appeals passed over these issues, which were fully argued, without comment.

The determination of whether this Court's decision in *NAACP v. Alabama* (which also applies to religious associations) should have been extended to the chilling effects of membership disclosure on the enforcement of First Amendment protections will affect an estimated one million adherents of the Santeria religion throughout the United States where its churches are uniformly perceived as dissident/controversial on account of the practice of animal sacrifice.

In addition, all other dissident/controversial religions and non-religious associations throughout the United States which have engendered public outrage and victimization for their beliefs, however bizarre, will be affected by this Court's decision.

This case is an appropriate one to settle the difficult issue of balancing the fundamental rights of a victimized dissident Plaintiff association to enforce its constitutional protections under the First Amendment with a Defendant's rights to discovery under the Fifth Amendment since it raises this issue in the context of both a class action and a protective order which were premised on the same special need of member protection.

QUESTION 2:

Conspiracy and Discovery; Opportunity to Obtain Non-Circumstantial Evidence Stifled.

The Court of Appeals affirmed the District Court's grant of Summary Judgment of November 30, 1992 (before the completion of discovery) in favor of Respondent CAN, Inc. on ostensible reliance on this Court's decision in: *Adickes v. S.H. Kress & Co.*, 398 US 144. (A-30)

In doing so, it in fact sanctioned a departure by the District Court in Summary Judgment cases involving conspiracy and constitutional issues which is in conflict with the decision in *Adickes v. S.H. Kress & Co.*, and which warrants the exercise of this Court's powers of supervision.

The core concern of this Court in *Adickes v. S.H. Kress & Co.* supra, was to ensure that a litigant alleging a controversial civil rights conspiracy (as in this case) had a proper opportunity to obtain non-circumstantial evidence from adverse or hostile witnesses in addition to circumstantial evidence.

See:

Adickes v. S.H. Kress & Co. p. 157

The District Court improperly refused Local Rule 2 information on the identity of the officers of Respondent CAN and denied a continuance of Summary Judgment to trace a material witness. (See pages A-36-A-38 supra).[8]

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[8] In refusing a continuance to trace material witness and former Church member Litchfield, the District Court omitted, from its opinion and order, certain material facts in Petitioners papers, namely:

1. CAN brochures and 6 of the 21 threatening letters were sent to Litchfield's mother. The letters informed her, her son had been under surveillance for 5 years.

2. Litchfield abruptly vanished before the events complained of.

3. Respondent Howlett's attorney (who also acted for CAN in an unrelated case) was a friend of Litchfield.

4. Respondent Howlett met Litchfield before he vanished and offered him guidance.

It has long been held that Summary Judgment proceedings are generally inappropriate to determine Constitutional issues and are not, in such cases, a sufficient substitute for trial.

See:

Mabey v. Regan, 537 F 2d 1036 at 1050 (19) (CA 9th); *Ferguson v. Omnimedia Inc.* 469 F 2d 194 at 198 (CA 1st).

STANDARD REQUIRED OF PETITIONERS TO DEFEAT SUMMARY JUDGMENT BEFORE DISCOVERY COMPETITION IN CONFLICT WITH DECISION IN ADICKES V. S.H. KRESS & CO. 398 US 144.

In order to resolve the core concern in the Adickes case, this Court determined that a Plaintiff alleging a conspiracy to violate constitutionally protected rights need only show the circumstantial "possibility" of a conspiracy to defeat Summary Judgement and proceed to trial. *Adickes v. S.H. Kress & Co.*, supra at P. 157.

It has also long been recognized that conspiracies by their nature are "rarely out in the open and proof of conscious conspiracy may depend on the careful marshaling of circumstantial evidence and the opportunity to cross examine hostile witnesses."

Ferguson v. Omnimedia, Inc. 469 F. 2d 194 at P. 198 (CA 1st).

The Court found, in the controversial circumstances of the Adickes case, that a mere sequence of events (sitting

at the luncheon counter at Kress store and the arrival of the police) was sufficient to infer the "possibility" of a conspiracy to defeat Summary Judgement.

The Court of Appeals in the present case affirmed the District Court's requirement of a higher standard than indicated in Adickes,[9] and sanctioned the refusal of Local Rule 2 information of the identities of Respondent CAN's officers (from which depositions could have been obtained). It also sanctioned the refusal to allow a continuation of Summary Judgment to obtain the whereabouts of a material witness whose address Respondent Howlett was ordered not to supply to Petitioners at his deposition shortly before oral argument on Summary Judgment.

Petitioners had established on record in opposing Summary Judgement (prior to discovery completion) sufficient circumstantial evidence of the possibility of conspiracy:

1. Respondent CAN, Inc., was a local affiliate of a national organization which monitors the harmful effects of mind control used by perceived cults.

2. Respondent CAN, Inc., was the only local affiliate

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[9] See District Court's judgment (A-34-A-35) quoting *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 "one of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims of defenses" ... "When a motion for Summary Judgment is made ... the adverse party(s) ... response by affidavit or otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial." The District Court found inferential evidence insufficient to defeat summary judgment.

operating in the New York/New Jersey area where the Church members and Respondent resided respectively.[10]

3. CAN "local affiliate" brochures[11] were sent in the anonymous packages to the same Church members which previously received 21 anonymous threatening letters with Respondent Howlett's P.O. Box number on them, which he acquired under an assumed name.[12]

4. The style and content of the threatening letters bore the hallmarks of a CAN operation, as were the incidence of anonymous hoax calls to the New York Police and Fire Departments and the use of P.O. Box numbers.

5. A 137-page Manual of Surveillance which recommended use of P.O. Box numbers under an assumed name, anonymous phone calls and threats of

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[10] This fact, which is contained in the Record, was ignored by both the District Court and Court of Appeals and is not reflected in their judgments.

[11] Though the word "Local affiliate" appeared in bold letters on the brochures, neither the District Court or the Court of Appeals considered this significant. Petitioners contended that the brochures were printed by the national body of CAN, for use by local affiliates such as Respondent CAN. Both Courts found the brochures to be those of the national body of CAN but made no finding on their intended use. Petitioners' motion to supplement papers in opposition to summary judgement with copies of a similar "local affiliate" brochure used by Respondent CAN was denied by the District Court.

[12] The Court of Appeals failed to refer to this link between the 21 threatening letters and the CAN local affiliate brochures.

IRS investigation (prepared by a then member of Respondent CAN) was available to all Respondent CAN members.

6. Respondent Howlett resided in Montclair, NJ, which contained the most active cell of Respondent CAN.

7. The affidavits in support of summary judgement by certain officers of Respondent CAN, did not preclude the possibility that members (or employees) of Respondent CAN were involved in the conspiracy to violate Petitioners' constitutional protections.[13]

The Court of Appeals' sanction of a higher standard than circumstantial "possibility" of a conspiracy and the stifling by the District Court of access to direct hostile evidence by Local Rule 2 information and the tracing of a material witness, is in direct conflict with this Court's judgement in *Adickes v. S.H. Kress & Co.* supra.

CERTIORARI APPROPRIATE; MAJOR DEPARTURES ON DISCOVERY ISSUES RENDERS ENFORCEMENT OF CONSTITUTIONAL PROTECTIONS INEFFECTIVE

Certiorari is appropriate on this question due to the extent to which the Court of Appeals has sanctioned major departures from the accepted and usual course of judicial proceedings on issues involving discovery and the enforcement of Constitutional protections by a dissident plaintiff association.

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[13] This issue was not addressed by the District Court or the Court of Appeals though argued in both Courts.

Such departures have rendered Petitioners' enforcement of their constitutional protections against victimization by unlawful conspiracies ineffective.

The question of the lower court's treatment of Summary Judgement issues, prior to discovery competition, in conspiracy cases is ripe for the grant of the writ in the light of this Court's recent decision in *Church Lukumi v. Hialeah* 113 S.Ct. 2217.

Since there can be no true grant of a constitutional protection to the controversial Santeria religion under the First Amendment without an effective remedy, it is appropriate that a writ be issued under the Court's supervisory powers to review the above mentioned departures by the District Court which the Court of Appeals sanctioned.

Without this Court's intervention, Petitioners and other adherents of the Santeria faith will remain the prey of hostile public sentiment and anti-Santeria groups on account of their religious beliefs.

As Alexis De Tocqueville correctly pointed out in "Democracy in America", Part II, Book I, Ch. 17:

> "As public opinion grows to be more and more the first and most irresistible of existing powers, the religious principle has no external support strong enough to enable it to resist its attacks."

CONCLUSION

Without the issue of a writ of certiorari for the foregoing reasons, the First Amendment protections afforded by the Constitution to the Santeria religion (and similar dissident associations) are more illusory than substantial.

Respectfully submitted by:

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Dated: New York, New York
May 15, 1995

Filed on April 28, 1995

UNITED STATES COURT OF APPEALS
for the Second Circuit
United States Courthouse
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New York 10007

George Lange III
Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of April one thousand nine hundred and ninety-five.

Hochberg

v Dkt No: 94-7566

Howlett

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellants IRVING HOCHBERG ET AL.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, CLERK
By:
Kathy Brouwer (Date)
Operations Mgr.

Order on the Appeal
Filed on February 15, 1995

RKW

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of February, one thousand nine hundred and (95)

Present:

Honorable Thomas J. Meskill,
Honorable Ralph K. Winter,
Honorable Joseph M. McLaughlin,
Circuit Judges.

IRVING HOCHBERG, MARTA KLAJMAN, SHELLEY SCHEFFLER, FIRST CHURCH OF CHANGO, INC., individually and on behalf of all members of First Church of Chango, Inc.,
Plaintiffs-Appellants,

v.

MAYNARD HOWLETT, EMANCIPATION, and CULT AWARENESS NETWORK, NY-NJ, C.F.F., INC.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Irving Hochberg, Marta Klajman, Shelley Scheffler and the First Church of Chango, Inc. appeal from Judge Patterson's dismissal of their complaint with respect to defendant Maynard Howlett, and grant of summary judgment with respect to defendant Cult Awareness Network, NY-NJ ("CAN NY-NJ"). Appellants do not dispute Howlett's contention that the third named defendant, Emancipation, is not an existent entity but is merely a name on a post office box. On appeal, appellants argue that Judge Patterson: (i) abused his discretion in dismissing their complaint with respect to Howlett under Fed. R. Civ. P. 37(b)(2)(C) for failure to cooperate with discovery, and (ii) erroneously granted summary judgment with respect to CAN NY-NJ.

"The imposition of sanctions under Rule 37 is within the discretion of the district court and a decision to dismiss an action for failure to comply with discovery orders will only be reversed if the decision constitutes an abuse of that discretion." John B. Hull, Inc. v. Waterbury Petroleum Prods., 845 F.2d 1172, 1176 (2d Cir. 1988). Because dismissal is a harsh sanction, it is appropriate only where the noncompliance is due to willfulness, bad faith, or fault rather than inability to comply or mere oversight. Societe Internationale pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. 197, 212 (1958). Appellants did not comply with the district court's order of November 3, 1993, which directed them to provide discovery to Howlett. Appellants refused to produce documents and

informed Howlett that they would not appear for their depositions in the absence of a written order. After a written order was issued, appellants still failed to appear. Appellants assert that their failure to comply with the district court's discovery orders was justified by a need to protect the identities of members of the Church of Chango. However, Judge Patterson balanced the competing interests of the parties and entered an appropriate protective order. We conclude that he acted within his considerable discretion in ordering discovery. Moreover, we note that appellants' refusal to comply with the court's order included matters not legitimately subject to a claim of confidentiality. It is thus beyond doubt that appellants acted willfully, and Judge Patterson did not abuse his discretion in dismissing their complaint with respect to Howlett.

Appellants argue that the district court erroneously granted summary judgment in favor of the defendant CAN NY-NJ. Appellants allege that CAN NY-NJ conspired to inhibit their First Amendment rights in violation of 42 U.S.C. § 1985 (3). They base their claim primarily on the following facts: (i) that a brochure published by the national CAN organization was mailed to members of the Church of Chango: (ii) that certain actions allegedly taken against them by an anonymous person were prescribed in a manual written by a former CAN NY-NJ member; and (iii) that Howlett lives in an area that "contains one of the most active anti-cult cells" of CAN NY-NJ. As the district court noted, even if all inferences are drawn in favor of appellants, these allegations fail to establish a connection between CAN NY-NJ and the actions described in the complaint. Thus, summary judgment was properly granted.

We therefore affirm.

Hon. Thomas J. Meskill, U.S.C.J.

Hon. Ralph K. Winter, U.S.C.J.

Hon. Joseph M. McLaughlin, U.S.C.J.

Opinion and Order
dated April 28, 1994

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IRVING HOCHBERG, MARTA KLAJMAN, SHELLEY SCHEFFLER, FIRST CHURCH OF CHANGO, INC., individually on their own behalf,

IRVING HOCHBERG, MARTA KLAJMAN, SHELLEY SCHEFFLER, suing on behalf of themselves and all other members of THE FIRST CHURCH OF CHANGO,

Plaintiffs,

- against -

MAYNARD HOWLETT, EMANCIPATION, CULT AWARENESS NETWORK, NY-NJ, C.F.F., INC.,

Defendants.

----------X

ROBERT P. PATTERSON, JR., U.S.D.J.

In this action alleging defamation and conspiracy to interfere with Plaintiffs' First Amendment rights to practice the Santeria religion, Defendant Maynard Howlett moves pursuant to Rule 37(b)(2)(C) of the Federal Rules of Civil Procedure to dismiss he action on the grounds that Plaintiffs

and their counsel willfully failed to appear for depositions and produce documents in accordance with the oral orders issued by this Court during a hearing on November 3, 1993. Plaintiffs cross-move for an order certifying a portion of the November 3, 1993 order pursuant to 28 U.S.C. § 1292(b) for interlocutory appeal. For the reasons stated below, Defendant Howlett's motion is granted, and Plaintiff's motion is denied.

BACKGROUND

Plaintiffs filed the complaint in this action on March 13, 1992 and filed an amended complaint on March 26, 1992. The amended complaint alleges libel and slander, as well as conspiracy to interfere with Plaintiffs' right to practice the Santeria religion in connection with 21 anonymous letters received by members of the First Church of Chango during the Spring of 1991. Defendant Howlett filed an answer to the amended complaint on April 30, 1992. By Opinion and Order dated November 30, 1992, this Court granted Defendant Cult Awareness Network's motion for summary judgment dismissing the action against it. Defendant Emancipation has not appeared.

Defendant Howlett's efforts to obtain document discovery from Plaintiff's date from May 22, 1992, when a First Notice to Produce Documents pursuant to Rule 34 of the Federal Rules of Civil Procedure was served on Plaintiffs. The notice contained five numbered requests, the first of which contained numerous subparts, for documents relating to the allegations in the amended complaint. Plaintiffs served a written response to the Notice to Produce on August 1, 1992, furnishing only the 21 allegedly defamatory letters and objecting to Defendant's other requests on various grounds, including that the requests were vague and overbroad, sought documents beyond the scope of

discovery and constituted an "annoyance, embarrassment and oppression." On November 16, 1992, Arthur S. Linker, one of Defendant's attorneys, wrote a letter to counsel for Plaintiffs in an effort to resolve the dispute over the document production, but no resolution was achieved.

Defendant's attempt to depose Plaintiffs began on January 29, 1993, when Plaintiffs Irving Hochberg, Marta Klajman, Shelly Scheffler and the First Church of Chango were served with a Notice of Deposition noticing their depositions for late February and early March 1993. Attached to the notices of deposition was a schedule listing the matters to be examined in the deposition. After discussion with Plaintiffs' counsel, counsel for Defendant agreed to reschedule the depositions for the week of June 14, 1993, and amended notices of deposition were served on April 21, 1993.

By letter dated May 12, 1993, counsel for Plaintiffs advised counsel for Defendant that he objected to the scope of the depositions as set forth in the schedule attached to the notices of deposition. Counsel for Plaintiffs also indicated that Defendant Howlett's refusal during his own deposition to reveal the address of a non-party witness "places [his] own demand for discovery in jeopardy." Fisher Aff., Exh. H. During the week of June 14, 1993, each of the Plaintiffs failed to appear for his or her deposition as noticed.

On August 18, 1993, Plaintiffs moved to compel Defendant to give additional deposition testimony and answer interrogatories and moved for a protective order against certain document and deposition testimony sought by Defendant. On September 15, 1993, Defendant cross-moved for an order pursuant to Rule 37 of the Federal Rules of Civil Procedure striking the Amended Complaint for Plaintiffs' failure to appear for depositions and to produce

documents and, in the alternative, for a scheduling order for discovery pursuant to Rule 26(f).

On November 3, 1993, during an oral argument lasting over two hours, the Court addressed and ruled on each of the parties' discovery issues. The Court denied Defendant's motion to dismiss the Amended Complaint and granted Defendant's request for a discovery plan. The Court ordered that Plaintiffs produce certain documents by December 1; that Plaintiffs appear for depositions on dates between December 8 and December 22 to be agreed upon by counsel; and that discovery of non-parties take place between December 22, 1993 and February 1, 1994. The Court also ordered the parties to submit a pretrial order by March 15, 1994 and set trial for March 21. The Court denied Plaintiffs' counsel's request for certification of the order for an interlocutory appeal. A court reporter was present and made a record of the proceeding, and on December 10, 1993, after receiving the transcript, the Court endorsed the motion papers incorporating the November 3, 1993 orders, nunc pro tunc, by reference to specific pages of the transcript.

By letters dated November 10, 1993, Plaintiffs' counsel informed non-party witnesses Mark Burchard and Larry Litchfield that their depositions, which previously had been scheduled for November 16 and 15, 1993, respectively, were being rescheduled for January 19 and 20, 1994 pursuant to the "terms of a scheduling order" by this Court. Fisher Aff., Exh. K. By letter dated December 1, 1993, counsel for Defendant informed counsel for Plaintiffs that Plaintiffs' depositions were being scheduled for December 10, 14, 16, and 17, 1993 pursuant to the Court's November 3, 1993 ruling. Fisher Aff., Exh. L.

On December 23, 1993, Defendant filed this motion

to dismiss the amended complaint pursuant to Rule 37 for Plaintiffs' willful failure to comply with the Court's November 3, 1993 order. On December 24, 1993, Plaintiffs cross-moved to certify the Court's order of December 10, 1993 for interlocutory appeal and to stay all discovery. Prior to the filing of Defendant's motion, Plaintiffs had not complied with any of the Court's orders of November 3, 1993. Plaintiffs did not produce documents by December 1, as ordered, or thereafter. Further, counsel for Plaintiffs informed counsel for Defendant by telephone conversations on December 9 and 13, 1993 that Plaintiffs would not appear for their depositions in the absence of a written scheduling order. Fisher Aff. ¶ 32, ¶ 35. At no point did Plaintiffs' counsel submit a proposed written order to the Court. Further, after a written order was entered by this Court on December 10, 1993, Plaintiffs still did not appear for depositions or produce the required documents.

DISCUSSION

Rule 37 (b) (2) authorizes a court to impose an array of sanctions for the failure of a party to obey a discovery order.

> [If] a party fails to obey an order [of discovery], . . . the court . . . may make such orders in regard to the failure as are just, and among others the following:
>
> * * * *
>
> (C) An order striking out pleadings or parts thereof, . . . or dismissing the action or proceeding or any part thereof . . .

Fed. R. Civ. P. 37 (b)(2). Acknowledging dismissal of an

action to be a harsh sanction, courts have held that it is appropriate only where the noncompliance is due to willfulness, bad faith, fault or gross negligence rather than inability to comply or mere oversight. Societe Internationale pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. 197, 212 (1958); Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp, 602 F.2d 1062, 1068 (2d Cir. 1979). Nonetheless, "in this day of burgeoning, costly and protracted litigation courts should not shrink from imposing harsh sanctions where . . . they are clearly warranted." Cine Forty-Second, 602 F.2d at 1068.

A court should exercise its discretion in choosing an appropriate Rule 37(b) sanction with a view toward the purposes such sanctions serve. International Mining Co., Inc. v. Allen & Co., 567 F. Supp. 777, 788 (S.D.N.Y. 1983). First, Rule 37 sanctions ensure that a party will not profit from its failure to comply with discovery orders. Second, sanctions aim to deter parties from flouting the specific orders at issue. Third, Rule 37 sanctions are intended to serve as a general deterrent against failing to participate in good faith discovery in compliance with court orders and in accordance with the responsibilities counsel owe to their opponents and to the court. Update Art, Inc. v. Modin Publishing, Ltd., 843 F.2d 67, 71 (2d Cir. 1988) (citing National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976); see also Cine Forty-Second, 602 F.2d at 1068. The Second Circuit has stated that the application of Rule 37's harshest sanctions serves to "emphasize the importance we place on a party's compliance with discovery orders. Such compliance is necessary to the integrity of our judicial process. A party who flouts such orders does so at his own peril." Id. at 73.

Plaintiffs' refusal to comply with the clear orders of this Court enunciated at the November 3, 1993 oral argument

on the parties' discovery motions warrants dismissal of the amended complaint in this case. The circumstances indicate willful disregard of the November 3, 1993 order by Plaintiffs or Plaintiffs' counsel. Plaintiffs' counsel's November 10, 1993 letters to the non-party witnesses made reference to the Court's oral order and indicate that he understood the terms of the order and that the order was binding. It is disingenuous for Plaintiffs' counsel now to assert that he did not believe he was required to comply with the Court's orders until a written order was signed.[1] In any event, such order was signed on December 10, 1993, nunc pro tunc to November 3, 1993. Plaintiffs could have submitted to depositions within the time required; however, no attempt was made to comply with the order.

Plaintiffs' other proffered reasons for failing to comply with the November 3, 1993 order fail to contradict that their failure to comply was willful. Plaintiffs argue, for example, that the disclosure of the names of members of the First Church of Chango, as required by the November 3, 1993 order, would render Plaintiffs' then-pending motion for class certification moot and that interlocutory appeal was necessary to protect the integrity of that motion as well as Plaintiffs' cause of action for conspiracy to interfere with the putative class's free exercise of religion.[2] Plaintiffs' counsel

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[1] Plaintiffs' reference to a telephone conversation between the Court's law clerk and counsel for Plaintiffs on December 8, 1993 is also disingenuous. Plaintiffs' counsel states that "[t]here was no indication that the court wished to sign a settled order." Anderson Aff. ¶6 at 4. Plaintiffs' counsel, however, was merely informed that the Court had not yet signed an order, id., and he does not purport to have discussed the substantive merits or nature of such an order with the law clerk.

[2] Plaintiffs' motion for class certification was denied by Order and Opinion of this Court dated January 10, 1994.

raised these arguments at the November 3 hearing. The Court denied Plaintiffs' oral motion for certification of the issue for interlocutory appeal and addressed Plaintiffs concerns about confidentiality by ordering that the names of the church members be kept confidential by Defendant and Defendant's counsel, who is serving pro bono through the auspices of this Court's pro se office. See Fisher Aff., Exh. J at 73-74 (Transcript). In declining to certify the issue of confidentiality for interlocutory appeal, the Court admonished Plaintiffs' counsel that refusal to comply with the Court's order could result in dismissal. Fisher Aff., Ex. J at 74-75. Thus, Plaintiffs' reliance on arguments already rejected by this Court and their duplicative written motion for interlocutory certification support, rather than detract from, a finding of willfulness.

Plaintiffs' repeated and protracted refusal to participate in discovery and their willful refusal to comply with the November 3, 1993 discovery order and the Court's written order of December 10, 1993 to the prejudice of Defendant's ability to develop a defense, indicate that lesser sanctions available under Rule 37 (b)(2) would be ineffectual or infeasible. Much of the thwarted discovery sought by Defendant is essential to Defendants' ability to prove the truth of the allegedly defamatory statements; deeming such statements to be true would be tantamount to dismissing Plaintiffs' claims. Similarly, given the pervasive scope of Plaintiffs discovery requests, striking portions of the amended complaint is not feasible. The willful conduct of Plaintiffs' and/or Plaintiffs' counsel calls for "strong medicine." Update Art, 843 F.2d at 73. Accordingly, Defendant Howlett's motion to dismiss is granted, and the

amended complaint is dismissed.[3]

CONCLUSION

Because Plaintiffs and/or Plaintiff's counsel have failed to produce documents and appear for their depositions in willful and flagrant disregard for this Court's oral order of November 3, 1993 and written order of December 10, 1993 Defendant's motion is granted and the Amended Complaint is dismissed. Plaintiffs' motion for certification pursuant to 28 U.S.C. § 1292 (b) is denied as moot.

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[3] There is no merit to Plaintiffs' contention that Defendant's counsel failed to establish that she made a good faith attempt to resolve the issues of her Rule 37 motion, as required by Local Rule 3(f). The affidavits of Defendant's counsel indicate that she informed Plaintiffs' counsel on December 1, 1993 that she had scheduled the depositions of Plaintiffs within the time ordered by the Court; that Plaintiff's counsel did not respond until December 9, less than twenty-four hours before the first such deposition was to begin; that, at that time, she learned from Plaintiffs' counsel that Plaintiffs would not appear for their depositions without a written order; that she did not agree to postpone Plaintiffs' depositions and believed she could not agree to do so without violating the Court's November 3 order; and that she called plaintiffs' counsel on December 13 to determine whether Plaintiffs would appear for their depositions scheduled during that week and was advised they would not. Fisher Aff. Pursuant to Local Rule 3 (f) at ¶¶ 2-4; Fisher Reply Aff. at ¶¶ 5-9. These statements reflect that Defendant's counsel discussed the issues involved in this motion with Plaintiffs' counsel in a good faith attempt to resolve the dispute and that the attempt was unsuccessful.

IT IS SO ORDERED.

Dated: New York, New York
April 28, 1994

Robert P. Patterson, Jr.
U.S.D.J.

Copies of this Opinion and Order were sent to:

Counsel for Plaintiffs:

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212-234-5224

Counsel for Defendant Maynard Howlett:

Mary B. Fisher, Esq.
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575 Madison Avenue
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Opinion and Order
dated January 10, 1994

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IRVING HOCHBERG, MARTA KLAJMAN, SHELLEY SCHEFFLER, FIRST CHURCH OF CHANGO, INC., individually on their own behalf,

IRVING HOCHBERG, MARTA KLAJMAN, SHELLEY SCHEFFLER, suing on behalf of themselves and all other members of THE FIRST CHURCH OF CHANGO,

Plaintiffs,

92 Civ. 1822 (RPP)

- against -

OPINION AND ORDER

MAYNARD HOWLETT, EMANCIPATION, CULT AWARENESS NETWORK, NY-NJ, C.F.F., INC,

Defendants.

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APPEARANCES

Counsel for Plaintiffs:

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Counsel for Defendant Maynard Howlett:

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By: Mary B. Fisher, Esq.
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ROBERT P. PATTERSON, JR., U.S.D.J.

Plaintiffs move pursuant to Rule 23 of the Federal Rules of Civil Procedure for class certification with respect to the second cause of action in their amended complaint, which alleges conspiracy to deprive and/or interfere with Plaintiffs' First Amendment rights to practice the Santeria religion. For the reasons stated below, the motion is denied.

BACKGROUND

The named plaintiffs in this suit are three members of the First Church of Chango (the "Church"), a Santeria church based in New York City with twenty-six members including the named plaintiffs. Their claims arise from the receipt by members of the Church of twenty-one allegedly defamatory, anonymous letters in 1991. The first cause of action alleges defamation and is brought by Plaintiffs Irving Hochberg, Marta Klajman, Shelley Scheffler and the Church, each on his or her own behalf. The second cause of action, for which Hochberg, Klajman, and Scheffler seek class certification, alleges conspiracy to interfere with their right to practice the Santeria religion.

In an Opinion and Order dated November 39, 1992, this court granted summary judgment with respect to defendant Cult Awareness Network, NY-NJ, on the grounds that Plaintiffs failed adequately to demonstrate a connection

between said defendant and the allegedly libelous letters. Familiarity with the facts as stated in that Opinion and Order is presumed.

Plaintiffs renew their motion for class certification originally filed in May 1992, amended on June 4, 1992, and adjourned by the court on June 19, 1992, by memo endorsed order. The motion is opposed by Defendant Maynard Howlett ("Defendant"), the only remaining defendant who has appeared in this case.[4]

DISCUSSION

Rule 23 (a) of the Federal Rules of Civil Procedure provides that a class action may be maintained

> only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims and defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

In determining whether a putative class is so numerous as to make joinder impracticable, "[c]ourts should not be so rigid as to depend on mere numbers" but should look to "all circumstances surrounding a case." Bishop v. New York City Dep't of Housing, Preserv. and Dev., 141 F.R.D. 229, 234 (S.D.N.Y. 1992) (quoting DeMarco v. Edens, 390 F.2d 836, 845 (2d Cir. 1968)). Factors to be considered in determining

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[4] Defendant Emancipation has not appeared in this case, and Plaintiffs have provided no evidence that such a person or entity exists.

the practicability of joinder include, in addition to the number of class members, "the inconvenience of trying individual suits, the nature of the action, the size of the individual claims, and the location of class members." Id. at 235 (citation omitted).

Even under this flexible approach to determining whether joinder is impracticable, courts have refused to certify classes where the members are relatively few, readily identifiable, and reside in the same geographic area. For example, in Moore v. Trippe, 743 F. Supp. 201 (S.D.N.Y. 1990), an action against town officials charging interference with plaintiffs' rights under the First and Fourteenth Amendments, plaintiffs moved to certify as a class fifty-four members of the Wellspring Zendo, a Zen Buddhist organization. Judge Goettel denied the motion on the basis, inter alia, that joinder was not impracticable, noting that the members were all identified and resided in the New York metropolitan area, though not in the same state. Id. at 211. See also Strykers Bay Neighborhood Council, Inc. v. City of New York, 695 F. Supp. 1531, 1538 (S.D.N.Y. 1988) (denying certification as a subclass to thirty-two families living in a Manhattan Urban Renewal neighborhood because joinder was not impracticable).

Plaintiffs have not demonstrated that the joinder of all members of the putative class here is impracticable. The Church has twenty-six members, all of whom live in New York, (Amended Complaint ¶ 3), and whose identities are known to Plaintiffs. In view of all the circumstances, the numerosity requirement of Rule 23 (a) is not satisfied.

Plaintiffs contend that joinder of all members of the Church of Chango is not practicable because the members fear reprisal and retaliation if their identities are revealed. The cases on which Plaintiffs rely, however, address the fear

of retaliation by the defendant employers in actions alleging discrimination in employment. See Slalina v. William Penn Parking Corp., 106 F.R.D. 419 (W.D. Pa. 1984); Bishop, 141 F.R.D. at 235. Unlike the instant case, however, the putative class members in those cases feared reprisal from the opposing party in the case. Here Plaintiffs fear reprisals from the general public or from people affiliated with the Cult Awareness Network, NY-NJ, an entity which has been dismissed from the case.[5] There is no reason that the putative class members' concerns with respect to those non-parties cannot be accomodated by other means than a class action--namely by referring to them in the caption by their initials and ordering that their identities be kept confidential by Defendant's pro bono attorney, as this court ordered on November 3, 1993 with respect to discovery. Accordingly, Plaintiffs have failed to demonstrate that joinder is impracticable, and their motion for class certification must be denied.

Plaintiffs' motion must also be denied because they have failed to demonstrate that they can adequately represent the interests of absent class members. Plaintiffs' actions and inaction in the conduct of this litigation does not reflect that they will prosecute this action vigorously and competently. See In Re Gulf Oil/Cities Service Tender Offer Litigation, 130 F.R.D. 383, 387 (S.D.N.Y. 1986) ("[T]the class representatives and their attorneys must vigorously and

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[5] In particular, Plaintiffs advert to Herbert Rosedale's alleged connections with the Cult Awareness Network. However Mr. Rosedale, who served as Howlett's agent for service of process during the period while California attorney Graham E. Berry, Esq., represented Howlett, no longer performs that role, since Rosenman & Colin have replaced Berry as counsel of record. Aff. of Mary B. Fisher, dated September 29, 1883, ¶6.

competently prosecute the action."). Plaintiffs' failure fully to participate in document and deposition discovery has twice resulted in Defendant filing motions for sanctions pursuant to Rule 37(d) of the Federal Rules of Civil Procedure and casts doubt on their ability to fulfill Darvin v. International Harvester Co., 610 F. Supp. 255, 257 (S.D.N.Y. 1985) ("[P]laintiff's failure to fully comply with reasonable discovery requests, as demonstrated by his refusal to answer relevant questions at both sessions of his deposition, indicate that he is not suitable to fulfill the fiduciary obligations of a class representative.").

CONCLUSION

For the reasons stated above, Plaintiffs' motion for class certification is denied.

IT IS SO ORDERED.

Dated: New York, New York
January 10, 1994

Robert P. Patterson, Jr.
U.S.D.J.

Opinion and Order
dated November 30, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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IRVING HOCHBERG, MARTA KLAJMAN, SHELLEY SCHEFFLER, FIRST CHURCH OF CHANGO, INC., Individually on their own behalf,

IRVING HOCHBERG, MARTA KLAJMAN, SHELLEY SCHEFFLER, suing on behalf of themselves and all other members of THE FIRST CHURCH OF CHANGO,

Plaintiffs,

- against -

MAYNARD HOWLETT, EMANCIPATION, CULT AWARENESS NETWORK, NY-NJ, C.F.F., INC.,

Defendants.

----------X

APPEARANCES

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By: Arthur S. Linker, Esq.

ROBERT P. PATTERSON, JR., U.S.D.J.

This is an action brought by plaintiffs Irving Hochberg, Marta Klajman, Shelley Scheffler ("individual plaintiffs") and the religious organization of which they are members, First Church of Chango, Inc. ("First Church") individually for libel by the defendants and individually and on behalf of all members of the First Church for conspiracy by the defendants to interfere with the First Church members' religious rights under the First Amendment in violation of 42 U.S.C. § 1985(3). Defendant Cult Awareness Network, NY-NJ, C.F.F., Inc. ("CAN NY-NJ) moves pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment upon the claims asserted against it. Plaintiffs move to strike the affidavits and supplementary affidavits of defendant CAN NY-NJ in support of its motion for summary judgment and in the

alternative move for a continuance pursuant to Rule 56(f).[6] For the reasons set forth below, Plaintiffs' motion to strike and motion for a continuance are denied, and CAN NY-NJ's motion for summary judgment is granted.

BACKGROUND

The First American Church of Chango is a religious organization incorporated and located in New York. The First Church has twenty-six members, all of whom practice variant of the Santeria religion, which is the result of a syncretism of the Catholic religion and the Yoruba religion of West Africa, and variants of which are widely practiced in parts of the Caribbean region and South America and are practiced to a limited extent in some regions of the United States. The individual plaintiffs are all members of the First Church. Hochberg is an obah, or priest, of the First Church and Klajman is a deaconess. When not engaged in First Church activities, Klajman is a businesswoman and Scheffler is a professionally certified social worker. Am. Compl. ¶¶ 10-12.

Defendant CAN NY-NJ is a private, not-for-profit cult awareness organization located in New Jersey and dedicated to informing the public about "destructive" cults and to helping families and individuals get out of organizations perceived by CAN NY-NJ to constitute such cults. In particular, CAN NY-NJ coordinates the activities of its members and offers referral and promotional services for activities directed at getting individuals out of cults.

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[6] Plaintiffs also move pursuant to Rule 23 to certify this action as a class action. By order dated June 10, 1992, this Court adjourned plaintiffs' motion pending a decision on the present summary judgment motion.

CAN NY-NJ is affiliated with the Cult Awareness Network National Office ("CAN National"), a separate entity based in Chicago, Illinois, and is part of a coalition of similar groups collectively termed Cult Awareness Network. CAN NY-NJ's president, Paul Engel, attends nearly all of CAN National's conferences. Reply Aff., Exh. A., ¶ 5 ("Engel Aff.").

Between March 1991 and June 1991, twenty-one unsolicited anonymous letters were received by ten members of the First Church, as well as by the husband of a member and the minor child of another member. Anderson Aff., Exh. A. Six of the letters were addressed to Mrs. Litchfield, a First Church member. All of the letters to the members as well as to the two non-members contain the allegedly libelous statements against each of the individual plaintiffs and the Santeria religion. Plaintiffs claim that the letters were designed to lure the recipient away from the First Church and to alienate each of the recipients from the individual plaintiffs by, for example, noting that Mr. Hochberg was the subject of an investigation by the Internal Revenue Service ("IRS"),[7] describing him as a "con artist" and "lecher," among other things, and stating that Ms. Scheffler is "under investigation for her unprofessional mien and abettor to extract monies, gifts and properties" from her social work clients. See, e.g., Anderson Aff., Exh. A (letters to Robin Litchfield).

Two of the letters were sent from Danbury,

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[7] Mr. Hochberg admits that "towards the end of 1991" his tax affairs were investigated by the IRS. The investigation apparently was dropped after Mr. Hochberg's attorney sent the IRS "a letter setting out and explaining the nature of the personal attacks which had been made upon me and other members of Plaintiff Church during the course of the year." Anderson Aff., Exh. D., ¶¶ 7-8 ("Hochberg Aff.").

Connecticut and the remaining letters, save one, were mailed from New York City. Anderson Aff. ¶ 6(ii). All of the letters appear to be in the same typeface and involved similar style and content. All of the letters employ the pronoun "we" to describe the writer; all of the letters describe Mr. Hochberg as an "opportunistic" former taxi driver who started the First Church in order essentially to steal money from its members; they all characterize Ms. Klajman and Ms. Scheffler as Mr. Hochberg's assistants; most of the letters also describe the history of Santeria; and many of the letters to the members state that the writer of the letters has "kept track of those who have left the group." Anderson Aff., Ex. A (see, for example, letters to Pitchell, Damian and Wolman). None of the letters was signed or otherwise identified the writer. However, seven of the letters referred to a post office box number in Danbury, Connecticut, and five of the seven letters asked the recipient to contact the writer by writing to the post office box number noted in the letter.

The letters were brought to the attention of the individual plaintiffs, who determined, upon inquiring with the United States Postal Services at Danbury, Connecticut, that the defendant Maynard Howlett, a resident of Montclair, New Jersey, Pl.'s 3 (g) Statement, had rented and was the sole registered user of the Post Office Box identified in the letters. During his deposition, Mr. Howlett stated that the box was rented in 1991 in his own name and in the name of Defendant Emancipation, an unincorporated entity or non-entity, on behalf of a friend, Jaime Rojas.[8] Howlett Dep. at

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[8] During his deposition Mr. Howlett referred to Emancipation as simply an "idea" -- neither a corporation, association or other legal entity -- developed by Mr. Rojas. Howlett Dep. at 15. He further stated that Mr. Rojas, an AIDS sufferer who subsequently died, had intended Emancipation to be a literary magazine by and for sufferers of AIDS.

13, 15.

On October 3, 1991, the recipients of the earlier letters, with one exception, each were sent a package that contained anti-Santeria literature as well as brochures from the "Cult Awareness Network" which bore the imprint of CAN National only. Anderson Aff., Exh. C.. The Brochure, a copy of which is attached as an exhibit to the Anderson affidavit, contains a general description of cults, of cult recruitment techniques, and of the Cult Awareness Network and its objectives. The brochure states that the "Cult Awareness Network is a coalition of volunteer affiliate groups throughout the United States" and describes CAN National as a "national non-profit organization." Id. The brochure does not provide the location of CAN National affiliates. Nor does the brochure mention CAN NY-NJ. One part of the brochure, however, appears to be addressed to "Local Affiliates" and appears to describe under the heading "What Can You Do?" different strategies that can be employed by groups that wish to form an anti-cult association and affiliate themselves with CAN National.

During his deposition, Mr. Howlett denied knowledge of the letters and stated that prior to the litigation he had not heard of the Cult Awareness Network, CAN National or defendant CAN NY-NJ. Anderson Aff. ¶ 7; Howlett Dep. at 86-87. He admitted, however, that prior to 1991 he knew or knew of certain former members of the First Church, including Mrs. Robin Litchfield's son, Sandt Litchfield, and her husband, Larry Litchfield. Prior to November 1991, Sandt Litchfield informed Mr. Howlett of the First Church's

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Howlett Dep. at 24. Mr. Rojas did not have the proper documentation to apply for a postal box and asked Mr. Howlett to apply on his behalf and for his use.

religious practices, criticized the individual plaintiffs and alleged that they had attempted to "brainwash" him and other members of the First Church. Howlett Dep. at 51-55.

On October 18, 1991, policemen responded to an anonymous telephone call made to the New York City Police Department alleging that a police officer had been shot on business premises owned by Klajman, and in August 1991, firemen responded to a call made to the New York City Fire Department claiming that a fire had broken out of the same business premises. The calls caused a serious disruption of Klajman's business. Anderson Aff., Exh. B ("Klajman Aff.").

Plaintiffs claim that Howlett and Emancipation have been using methods that closely follow techniques advocated in a Manual of Surveillance (the "Manual"). The Manual recommends using mailings against perceived cults from post office boxes, urges the reporting of perceived cults and its members to the IRS, advocates debriefing former members of cults for the purpose of gathering information about current members, and outlines and describes different forms of surveillance of cult members. Robertson Aff., Exhs. C & D. The Manual was co-written by Larry Zilliox, Robertson Aff. ¶ 15, a former member and board member of defendant CAN NY-NJ who, defendant states, quit CAN "about three ... years ago," Reply Aff., Exh. C, ¶ 6 ("Hudson Aff.") (dated July 17, 1992). On the basis of various newspaper accounts dated December 1989 which describe Zilliox as a "director of operations of the Cult Awareness Network of New York-New Jersey," Robertson Supplementary Aff., Exh. B, Reverend Robertson, plaintiffs' expert on cult awareness groups, in a supplementary affidavit opines that Zilliox was a member of CAN at least as late as March 1990. Reverend Robertson's supplementary affidavit in this regard is not based on personal knowledge and does not state

whether the Manual was written before or after March 1990. Furthermore, while plaintiffs merely assert that the Manual was co-written by a CAN NY-NJ "member," officers and board members of defendant CAN NY-NJ state that Zilliox wrote the Manual after he left CAN NY-NJ, see, e.g., Reply Aff., Exh. B, ¶ 8 ("Goldberg Aff."). In addition, the March 1990 newspaper accounts, upon which Reverend Robertson relies to make his assertion that Zilliox was a CAN NY-NJ member in March 1990, do not identify Zilliox as a member of defendant CAN NY-NJ but rather as a member of Cult Awareness Network.

On March 13, 1992, Plaintiffs filed a complaint against defendants Howlett and Emancipation. On March 26, 1992, Plaintiffs filed an amended complaint adding CAN NY-NJ as a defendant and claiming that "Howlett and Emancipation and others with the cooperation, support and participation of ... [CAN NY-NJ]" conspired to violate Plaintiffs' rights under the First Amendment. Am. Compl. ¶ 63.

DISCUSSION

Summary judgment is appropriate if the evidence offered demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). The burden rests on the moving party to demonstrate the absence of a genuine issue of material fact, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970), and the Court must view the facts in the light most favorable to the non-moving party, United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

Motion to Strike

Plaintiffs move to strike the original affidavits and supplementary affidavits of CAN NY-NJ members as well as the reply affidavit of CAN NY-NJ's counsel, George Damashek, Esq., in support of the motion for summary judgment on the ground that the affidavits fail to satisfy the standards of Rule 56(e) of the Federal Rules of Civil Procedure because they are not expressly affirmed to be based on personal knowledge. Rule 56 does not require such a declaration.[9] Rule 56 merely requires that "supporting and opposing affidavits shall be made on personal knowledge...." Fed. R. Civ. P. 56(e). In any event, the information contained in each of the affidavits of the CAN NY-NJ members indicates a basis in personal knowledge that is supported by the record. Furthermore, defendant has submitted additional, supplementary affidavits that affirmatively state that each affidavit is based on personal knowledge, which is sufficient to cure any defects that may have existed in the original affidavits. Gordon v. Watson, 622 F.2d 120, 123 (5th Cir. 1980); New York State Energy Research and Dev. Auth. v. Nuclear Fuel Servs., Inc., 561 F. Supp. 954, 960 (W.D.N.Y. 1983); Liberty Curtin Concerned Parents v. Keystone Cent. Sch. Distr, 81 F.R.D. 590, 604 (M.D.Pa. 1978).

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[9] In the cases cited by plaintiffs in support of their objection, either the information contained in the affidavit failed to indicate that it was based on personal knowledge, see Kamen v. AT&T Co., 791 F.2d 1006, 1011 (2d Cir. 1986), or the stricken affidavit was expressly affirmed to be based, in whole or in part, "on information and belief" rather than personal knowledge. Sellers v. M.C. Floor Crafters, Inc., 842 F.2d 639, 643 (2d Cir. 1988) (affidavit ruled insufficient when it is based on "personal knowledge or upon information and belief" because there was no way to ascertain which portions of affidavit were based on personal knowledge).

Plaintiffs also assert that Rule 56 does not provide for the filing of reply affidavits in summary judgment proceedings. Rule 56(e) specifically provides, however, that the "court may permit affidavits to be supplemented by ... further affidavits." Fed. R. Civ. P. 56(e). Accordingly, the Court denies the plaintiffs' motion to strike and will rely on defendant's supplementary and reply affidavits on this motion for summary judgment.

Summary Judgment Motion

Plaintiffs maintain that the following evidence "demonstrates the participation of [CAN NY-NJ] in the attacks upon Plaintiff...," Anderson Aff. ¶ 13, and, specifically, demonstrates a connection between defendants CAN NY-NJ, Howlett and Emancipation to inhibit the First Amendment rights of Church members: (1) that in the second batch of mailings Church members received the CAN National brochure; (2) that such a brochure is at the disposal of defendant CAN NY-NJ as an affiliate of CAN National; (3) that the use of a post office box, the "pattern of mail harassment and false telephone calls in 1991," Anderson Aff. ¶ 13, and other techniques used by the sender of the mailings are advocated in a manual written by a former CAN NY-NJ member, and are "consistent with [CAN's] anti-cult activities" according to Reverend Robertson's expert opinion, see Pl.'s 3(g) Statement ¶ 2(a); and (4) that Howlett, whom plaintiffs claim is directly responsible for sending the material, lives in an area "which contains one of the most active anti-cult cells" of CAN NY-NJ.[10] Pl.'s 3(g)

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[10] Plaintiffs also claim that a connection between defendant CAN NY-NJ and Howlett is demonstrated by the fact that Herbert Rosedale, Howlett's Local Rule 3(a) attorney upon whom service of papers in this case may be made, is president of American Family Foundation, Inc., a not-for-profit corporation dedicated to educating the public about

Statement, ¶ 2(k). Plaintiffs also contend that the anti-cult activity directed against members of the First Church required a degree of organization and manpower available only to defendant CAN NY-NJ.[11]

When viewed in a light most favorable to plaintiffs, these "facts" fail adequately to show a "connection" between defendant CAN NY-NJ and the libelous letters permitting CAN NY-NJ to be named in this complaint. The plaintiffs primarily rely on the way in which the techniques employed in the anti-Church mailings follow the instructions set out in the Manual. The plaintiffs do not point to any facts, however, that demonstrate that Zilliox participated in or was associated with the mailings at issue; nor have plaintiffs shown, by affidavits or otherwise, that Zilliox cooperated in or supported the allegedly libelous mailings: the Manual of Surveillance was made available to all CAN members throughout the country, Robertson Aff. ¶4(a) (iii), at 8-9. Even if such an association existed between Zilliox and the mailings, it would be immaterial to the issue of CAN NY-

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destructive cults. Mr. Rosedale attended a CAN National conference in 1989, and also on occasion attended CAN NY-NJ meetings which appear to have been open to all. In his letter dated May 27, 1992, however, Mr. Rosedale states that the American Home Foundation has no connection to CAN National, defendant CAN NY-NJ, or Cult Awareness Network (California). Furthermore, the alleged connection that does exist between Mr. Howlett and defendant CAN NY-NJ by virtue of Mr. Rosedale's agency under Local Rule 3 (a) was made well after the cause of action arose in this case and is not relevant to the issue of CAN NY-NJ's involvement with the libelous materials in 1991.

[11] Plaintiffs also make a conclusory allegation that Howlett is a CAN NY-NJ "anti-cultist counselor" who "counseled an ex-Church member." Id. Such conclusory statements unsupported by the record are inadequate under Rule 56. Kamen v. AT&T Co., 791 F.2d 1006, 1011 (2d Cir. 1986); Flaherty v. Coughlin, 713 F.2d 10, 13 (2d Cir. 1983).

NJ's participation in the mailings, for the plaintiffs do not dispute defendant CAN NY-NJ's contention that the Manual was co-written by Mr. Zilliox after he ceased his involvement with defendant CAN NY-NJ.[12] Reply Aff., Exh. B., ¶ 8 ("Goldberg Aff."). Finally, Reverend Robertson's allegations linking the Manual with the mailing activities and his assertions (1) that the Cult Awareness Network continues to put out the Manual, (2) that the mailings were patterned after the Manual, (3) that local Cult Awareness Network affiliates and, by implication, defendant CAN NY-NJ rather than CAN National are responsible for distributing "this particular type of brochure," Robertson Aff. ¶5(c)-(d), and (4) that Zilliox remains a member of the CAN NY-NJ, are predicated upon conjecture and surmise rather than fact. [13] Conjecture and guesswork in an affidavit, even when premised on the most careful analysis of factual odds and ends, cannot form the basis upon which to defeat a motion for summary judgment; each allegation must enjoy factual support. Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2553 (1986) ("One of the principal purposes of the summary judgment rule is to isolate and dispose of factually

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[12] Although plaintiffs argue that Mr. Zilliox was a member of CAN NY-NJ well into 1990, they have not offered any evidence in support of that claim. See pp. 7-8, supra. Plaintiffs do not state when the Manual was prepared, nor do they claim that Mr. Zilliox prepared the Manual while still a member of defendant CAN NY-NJ.

[13] Reverend Robertson's affidavit points to the October 1991 affidavit of John Nordquist submitted in an action unrelated to the instant case in which Mr. Nordquist states that Mr. Zilliox "still is ... the security chief for the Cult Awareness Network." Robertson Supplementary Aff., Exh. F., ¶ 7. Mr. Nordquist's affidavit never indicates, however, that Mr. Zilliox was a member of defendant CAN NY-NJ.

unsupported claims or defenses...."). See also Fed. R. Civ. P. 56(e) ("When a motion for summary judgment is made ... the adverse party['s] ... response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.").

Plaintiffs also have failed to show any other connection between defendant CAN NY-NJ and the mailings. (1) the brochures to which Plaintiffs point to argue that defendant CAN NY-NJ was involved in sending the libelous letters, bears the imprint of a separate entity, CAN National, alone: a copy of the brochure attached as an exhibit to Mr. Anderson's affidavit bears the imprint "*CAN/1990, Chicago, Il." and "National Office," Anderson Aff., Exh. C; (2) in the brochure no reference is made to defendant CAN NY-NJ; (3) it is undisputed that the brochures that defendant CAN NY-NJ issues or distributes contain CAN NY-NJ's own imprint which includes CAN NY-NJ's name, its address at Teaneck, New Jersey, P.O. Box 867, and its New Jersey telephone number, Goldberg Aff., Exh. 1; (4) it is also not disputed that mailings of literature or other material emanating from CAN NY-NJ are sent in "envelopes that bear the name of defendant CAN [Ny-NJ], and its Post Office Box 867, Teaneck, New Jersey 07666," Reply Aff., Exh. D, ¶6 ("Rheinfeld Aff."); Feron Aff., ¶ 5; and (5) the brochures that were sent to Church members are available to non-CAN members who attend conferences sponsored by CAN National. Engel Aff. ¶ 5.

In short, Plaintiffs fail to show that defendant CAN NY-NJ proximately caused or was even connected with the publication of the allegedly libelous material, with the allegedly unlawful purpose of the mailings, or with Howlett and Emancipation, the other defendants in this case -- connections, moreover, that CAN NY-NJ, by its officers' affidavits, denies. An essential element of a civil conspiracy

is some personal involvement or cooperation by the defendant to further the unlawful act as part of a combination or agreement. See Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971) [14]; Powell v. Kopman, 511 F. Supp. 700, 704 (S.D.N.Y. 1981) (defining civil conspiracy). Because Plaintiffs have not demonstrated by reference to facts that defendant CAN NY-NJ or its members, rather than another entity -- such as CAN National, another Cult Awareness Network affiliate, or a non-CAN organization or individual -- actually was involved in, cooperated with or supported the preparation or mailing of the allegedly libelous material received by the Church members, defendant CAN NY-NJ's motion for summary judgment is granted.

Continuance

Plaintiffs request a continuance of the summary judgment motion for purposes of discovery pursuant to Rule 56 (f) of the Federal Rules of Civil Procedure.[15] A party

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[14] In Griffin, the Supreme Court set forth the requirements for a violation of 42 U.S.C. § 1985(3). The Court stated that to make out a valid cause of action under 42 U.S.C. § 1985 (3) a plaintiff must allege four elements: (1) a conspiracy; (2) a purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to the plaintiff's person or property or any right or privilege of a citizen of the United States. 403 U.S. at 102-03.

[15] Rule 56(f) states in relevant part:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court ... may order a continuance to permit affidavits to be obtained or depositions to be

seeking such a continuance "must file an affidavit explaining (1) what facts are sought and how they are to be obtained, (2) how those factors are reasonably expected to create a genuine issue of material fact, (3) what effort the affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts." Hudson River Sloop Clearwater, Inc. v. Department of Navy, 891 F.2d 414, 422 (2d Cir. 1989) (citing Burlington Coat Factory Warehouse Corp. v. Esprit De Corp., 769 F.2d 919, 926 (2d Cir. 1985)).

Plaintiff's affidavit in support of a continuance states that the "testimony of Mr. Sandt Litchfield appears to be central to the issues in question but according to Mr. Berry, who states he acts for him, is not presently available. In addition, plaintiffs have also not completed their discovery of documentation in the possession of non-parties nor their discovery with regard to the parties in this action."[16]

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taken or discovery to be had or may make such other order as is just.

[16] Plaintiffs also state that they were unable to oppose the motion for summary judgment because Graham Berry, Esq., Howlett's former attorney, a California attorney acting voluntarily and not admitted pro hac vice by the Court, refused at Howlett's deposition to provide names and addresses of his proposed witnesses in support of Howlett's defense. Anderson Aff. ¶ 15. The information sought, however, was claimed to be relevant only to support Howlett's tenth affirmative defense which states in part, that "[a]ny comments, statements, or communications by [Howlett] were made in good faith, and [Howlett] has acted, at all relevant times thereto, in good faith." See Howlett Dep. at 65-69. Because the grant of summary judgment does not depend on the issue of Howlett's good faith, allowing discovery on that point would not affect the outcome of this summary judgment motion.

Anderson Aff. ¶ 15; see also Anderson Supp. Aff. ¶ 11.

Mr. Anderson's 56 (f) affidavit omits the most important grounds for granting a continuance, namely, what facts are sought and how these facts are reasonably expected to create a genuine issue of material fact. Sandt Lichtfield is not alleged to be a member of CAN NY-NJ, and CAN NY-NJ's officers affirm that Litchfield, like Howlett, is not and has not been a member of their organization. Plaintiffs do not explain how Mr. Litchfield can reasonably be expected to create a genuine issue of material fact as to CAN NY-NJ's alleged liability in this action. Without a showing that a genuine issue of material fact will arise with further discovery, this Court must deny Plaintiffs' motion for a continuance.

CONCLUSION

For the reasons stated above, defendant CAN NY-NJ's motion for summary judgment on Plaintiffs' first and second causes of action is granted, and Plaintiffs' motion for a continuance and motion to strike supplementary affidavits are denied.

IT IS SO ORDERED.

Dated: New York, New York
November 30, 1992

Robert P. Patterson, Jr.
U.S.D.J.

Supreme Court, U.S.
FILED
JUN 13 1995
OFFICE OF THE CLERK

(2)

No. 94-1903

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

IRVING HOCHBERG, MARTA KLAIMAN, SHELLEY SCHEFFLER, FIRST CHURCH OF CHANGO, INC., individually and on behalf of all members of the FIRST CHURCH OF CHANGO, INC.,

Petitioners,

v.

MAYNARD HOWLETT, EMANCIPATION, and CULT AWARENESS NETWORK, NY-NJ, C.F.F., INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT, CULT AWARENESS NETWORK, NY-NJ, C.F.F., INC. IN OPPOSITION

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TOP

QUESTIONS PRESENTED

I. Was the decision of the Court of Appeals, in its affirmance of the granting by the District Court of summary judgment dismissing the complaint as to Respondent Cult Awareness Network, NY-NJ, C.F.F., Inc. in conflict with the decision in *Adikes v. S. H. Kress & Co.*, 398 U.S. 144 (1970)?

II. Was the decision of the Court of Appeals inconsistent with the standards to be applied to discovery proceedings, so as to call for an exercise of this Court's power of supervision?

Page

TABLE OF CONTENTS

QUESTIONS PRESENTED. i

TABLE OF CITATIONS. ii

PERCEIVED MISTATEMENT OF FACTS. 1

SUMMARY OF ARGUMENT 2

I. The Court Of Appeals Decision Affirming The District Court's Granting Of Summary Judgment Dismissing The Complaint As To Respondent Cult Awareness Network, NY-NJ, C.F.F., Inc., Is Not In Conflict With The Decision In *Adikes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). 2

II. The Decision Of The Court Of Appeals Is Not Inconsistent With The Standards To Be Applied To Discovery Proceedings, So As To Call For An Exercise Of This Court's Power Of Supervision 3

CONCLUSION 4

TABLE OF CITATIONS

Case:

Adikes v. S.H. Kress & Co., 398 U.S. 144 (1970). . . . . i, 2

Rule:

Federal Rules of Civil Procedure Rule 56(f) 3

No. 94-1903

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OCTOBER TERM, 1994

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BRIEF OF RESPONDENT, CULT AWARENESS NETWORK, NY-NJ, C.F.F., INC. IN OPPOSITION

PERCEIVED MISTATEMENT OF FACTS

1. The Petition alleges (pp. 13 and 26), that Church members received anonymous packages containing CAN "*local affiliate*" brochures. However, the District Court found that the brochures "bore the imprint of CAN

NATIONAL only", and that they did not mention Respondent Cult Awareness Network, NY-NJ, C.F.F., Inc. (hereinafter "CAN NY-NJ") (A 28).

2. The Petition also alleges (pp. 13 and 27), that the Manual of Surveillance upon which Petitioners relied heavily in opposition to Respondent CAN NY-NJ's motion for summary judgment, was prepared "by a then member of Respondent CAN". The District Court determined, however, that Larry Zilliox, the co-author of the Manual, was a "former" member of said Respondent (A 27), a fact undisputed by Petitioners (A 34).

SUMMARY OF ARGUMENT

I.

THE COURT OF APPEALS DECISION AFFIRMING THE DISTRICT COURT GRANTING OF SUMMARY JUDGMENT, AND DISMISSAL OF THE COMPLAINT AS TO RESPONDENT CAN NY-NJ IS NOT IN CONFLICT WITH THE DECISION IN *ADIKES v. S. H. KRESS & CO.*, 298 U.S. 144 (1970).

Whereas, in *Adikes,* this Court held that summary judgment was improper because the "respondent failed to carry its burden of showing the absence of any genuine issue of fact" (398 U.S. 144, 153), the Court of Appeals in the case at bar held (A 5):

> "* * * As the district court noted, even if all inferences are drawn in favor of appellants, these allegations fail to establish a connection between CAN NY-NJ and the activities described in the complaint. * * *"

II.

THE DECISION OF THE COURT OF APPEALS IS NOT INCONSISTENT WITH THE STANDARDS TO BE APPLIED TO DISCOVERY PROCEEDINGS, SO AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Petitioners would argue (Pet. 22-27), that the denial by the District Court of their application for a continuance for the purpose of further discovery prior to granting of summary judgment, was a departure from the accepted and usual course of judicial proceedings, and that the Court of Appeals sanctioned such purported departure, requiring the exercise of this Court's power of supervision.

However, in addition to the District Court finding of an absence of any genuine issue of fact, as noted in Subdivision I above, the District Court, in its discretion, denied Petitioners' application for a continuance for their failure to submit an affidavit as mandated by F.R.C.P. Rule 56(f), setting forth "what facts are sought and how these facts are reasonably expected to create a genuine issue of material fact" (A 38). The Court of Appeals declined to interfere with this exercise of discretion.

There was thus no departure from the accepted and usual course of judicial proceedings by the District Court, nor any sanction of any such purported departure by the Court of Appeals. Nor is there any call for the exercise by this Court of its power of supervision.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

No. 94-1903

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IN THE

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OCTOBER TERM, 1994

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Petitioners,

—against—

MAYNARD HOWLETT, EMANCIPATION, and CULT AWARENESS NETWORK, NY-NJ, C.F.F., INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT MAYNARD HOWLETT IN OPPOSITION

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12pp

Questions Presented*

1. Whether the United States Court of Appeals for the Second Circuit properly held that the district court did not abuse its discretion in dismissing petitioners' amended complaint pursuant to Fed. R. Civ. P. 37(b)(2)(C) based on petitioners' willful refusal to produce documents or appear for their depositions in violation of the district court's oral order entered on the record November 3, 1993, entered as a written order on December 10, 1993 *nunc pro tunc* (the "November 3, 1993 Order")?

2. Whether the United States Court of Appeals for the Second Circuit properly held that the district court did not abuse its discretion, in balancing the First Amendment rights of the members of petitioner First Church of Chango (the "Church") to privacy and protection of their religious associations with the competing Fifth Amendment rights of respondent Maynard Howlett ("Howlett") to due process in the conduct of discovery and preparation of an adequate defense in a private litigation, by crafting a narrowly drawn protective order which directed petitioners to furnish the names and addresses of present and former Church members to Howlett's counsel, and the names only to Howlett?

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* Petitioners also seek certiorari with regard to the court of appeals' affirmance of the district court's order dated November 30, 1992, granting summary judgment dismissing the amended complaint against defendant Cult Awareness Network, NY-NJ, C.F.F., Inc. Inasmuch as the district's court's grant of summary judgment in favor of CAN does not affect respondent Howlett, this brief does not address that portion of the petition.

Parties

Petitioners are Irving Hochberg, Marta Klajman and Shelley Scheffler, who claim to be members of the Church, and The Church. The Church claims a total membership of 26 persons, all of whom are New York residents. The members of the Church allegedly practice a variant of the Santeria religion.

Respondent Howlett is an individual who, at the time this action was commenced, resided in New Jersey.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Parties	ii
Table of Authorities	iv
Statement of the Case	1
Reasons for Denying the Writ	2
Conclusion	4
Addendum	1a

TABLE OF AUTHORITIES

Cases PAGE

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923) 3

Marshall v. Bramer, 828 F.2d 355 (6th Cir. 1987)..... 3

National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1975) 3

Rice v. Sioux City Cemetery, 349 U.S. 70 (1955)..... 3

Seattle Times v. Rinehart, 467 U.S. 20 (1983)..... 3

Statutes and Rules

Sup. Ct. R. 10.1 2

Statement of the Case

Petitioners brought this action alleging libel and conspiracy to interfere with their First Amendment rights. The action is based upon 21 anonymous allegedly defamatory letters received by certain other members of The Church over a three-month period in Spring 1991.

Howlett's answer denied the essential allegations of the amended complaint (including the allegations that Howlett wrote or published the 21 letters) and asserted numerous affirmative defenses, including the defenses that the allegedly defamatory statements are true, that the allegedly defamatory statements are expressions of opinion, and that the allegedly defamatory statements are privileged and protected under the First Amendment.

Despite his own cooperation with petitioners' discovery requests, Howlett tried unsuccessfully for over a year and one half to obtain documents from petitioners pursuant to his Fed. R. Civ. P. 34 Request, which petitioners refused to produce. Howlett also tried unsuccessfully for nearly a year to procure petitioners' appearance at depositions so that he could learn the purported basis for the serious and harmful allegations asserted against him in the amended complaint.

Petitioners' intransigence forced Howlett to move for discovery sanctions pursuant to Fed. R. Civ. P. 37 on two separate occasions. On November 3, 1993, upon the first Rule 37 motion, the district court heard argument on the record for longer than two hours and (a) granted in part petitioners' motion for a protective order, and directed that the names and addresses of all present and former members of the Church be disclosed to Howlett's counsel, and that the names only be furnished to Howlett, in order to assist counsel in preparing for depositions, (b) directed petitioners to comply with Howlett's discovery requests (as modified by the district court's rulings concerning relevance) on dates set by the district court.

Petitioners did not produce any documents as ordered by the district court, nor did petitioners appear for their depositions as scheduled pursuant to the district court's order.

Howlett's second Rule 37 motion, which was based on petitioners' willful failure to appear for their depositions or produce documents as required by the November 3, 1993 Order, resulted in dismissal of the amended complaint by the district court on April 28, 1994.

The court of appeals affirmed the district court, holding that:

> Judge Patterson balanced the competing interests of the parties and entered an appropriate protective order. We conclude that he acted within his considerable discretion in ordering discovery. Moreover, we note that appellants' refusal to comply with the court's order included matters not legitimately subject to a claim of confidentiality. It is thus beyond doubt that appellants acted willfully, and Judge Patterson did not abuse his discretion in dismissing their complaint with respect to Howlett.

(Appendix to Petition, A5)

Reasons for Denying the Writ

This case involves none of the "special and important reasons" warranting a writ of certiorari. *See* Sup. Ct. R. 10.1. This case does not involve a conflict among the circuit courts, a departure from the accepted and usual course of judicial proceedings or sanction of such a departure by a lower court, *see* Sup. Ct. R. 10.1(a), or a court of appeals decision on an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court, *see* Sup. Ct. R. 10.1(c), as to call for an exercise of the Court's discretionary review.

It is well-settled that certiorari should issue only in cases involving "principles the settlement of which is of importance to the public as distinguished from that of the parties" and in cases of conflict between the circuit courts. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955), *quoting*, *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). This is not such a case.

Rather than involve any issues of importance to the public, this case involves only the dispute between the parties concerning the district court's exercise of discretion in controlling discovery and entering sanctions for non-compliance with its orders. Moreover, the decisions below of the district court and the court of appeals are both clearly correct.

While petitioners claim that the court of appeals sanctioned the district court's approach which conflicted with decisions of this Court, in fact there was no such conflict. This Court has recognized that "[t]he trial court is in the best position to weigh fairly the competing needs and interests of the parties affected by discovery," even in cases involving claimed constitutional rights. *Seattle Times v. Rinehart*, 467 U.S. 20, 26 (1983). In this case, the district court properly balanced petitioners' First Amendment rights consistent with this Court's First Amendment jurisprudence with respondent's Fifth Amendment rights in a carefully drawn order which granted in part petitioners' motion for a protective order. *Cf. Marshall v. Bramer*, 828 F.2d 355, 360 (6th Cir. 1987). When petitioners nevertheless willfully refused to appear for their depositions or to produce documents in compliance with the district court's order, the district court acted well within its discretion in dismissing the action, and the court of appeals acted properly in affirming that dismissal. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1975).

Conclusion

This case involves the district court's carefully fashioned discovery order which appropriately dealt with the First Amendment issues raised by petitioners, and the district court's well-justified dismissal of the action based on petitioners' willful failure to comply with that discovery order. No issues of general or interest or importance are raised, and the only parties affected by the decision below are the litigants. We respectfully submit that certiorari should be denied.

Respectfully submitted,

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ADDENDUM

Addendum

Constitutional Provisions, Statutes, and Rules Involved

U.S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fed. R. Civ. P. 37(b)(2):

> If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> * * *

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any party thereof, or rendering a judgment by default against the disobedient party.

No. 94-1903

(4)

Supreme Court, U.S.
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In The

Supreme Court of The United States

October Term, 1994

IRVING HOCHBERG, MARTA KLAJMAN, SHELLEY SCHEFFLER, FIRST CHURCH OF CHANGO, INC., individually and on behalf of all members of the FIRST CHURCH OF CHANGO, INC.,

Petitioners,

- against-

MAYNARD HOWLETT, EMANCIPATION, and CULT AWARENESS NETWORK, NY-NJ, C.F.F., INC.,

Respondents.

JOINT REPLY OF PETITIONERS TO RESPONDENTS' OPPOSING BRIEFS

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9 pp

TABLE OF CONTENTS

Page

Reply to Brief of Respondent Cult Awareness Network, NY-NJ, C.F.F., Inc. 2

Disputed Facts in Summary Judgment Proceedings 2

Rule 56 (f) FRCP; Continuance for Discovery . . 2

Conclusion 3

Reply to Brief of Respondent Howlett 3

Misstatements of Facts 3

Core Issues Trivialized 5

Conclusion 6

TABLE OF CITATIONS

Adickes v. S.H. Kress & Co. 398 US 144 2

Anderson v. Liberty Lobby, Inc. 477 US 242 . . 2

Eastman Kodak Co. v. Image Technologies Services, Inc. 504 US 451 2

Littlejohn v, Shell Oil Co. 483 F. 2d 1140 3

TABLE OF CONTENTS

Page

RULES

Rule 56 (f) FRCP 2

STATUTORY PROVISIONS

U.S. Constitution; First Amendment 6

18 USC 876 [Ch. 41, Title 18, Sec. 876, Para. 3] 6

New York State Penal Law 240.30 [1] 6

No. 94-1903

In The

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October Term, 1994

IRVING HOCHBERG, MARTA KLAJMAN, SHELLEY SCHEFFLER, FIRST CHURCH OF CHANGO, INC., individually and on behalf of all members of the FIRST CHURCH OF CHANGO, INC.,

Petitioners,

- against-

MAYNARD HOWLETT, EMANCIPATION, and CULT AWARENESS NETWORK, NY-NJ, C.F.F., INC.,

Respondents.

JOINT REPLY BRIEF

Petitioners reply to the issues raised in the Respondents' briefs as follows:

REPLY TO BRIEF OF RESPONDENT CULT AWARENESS NETWORK, NY-NJ, C.F.F., INC.

1. Disputed facts in Summary Judgment Proceedings

Respondent CAN alleges that:

a) The District Court found the CAN brochures that were sent to ten Church members emanated from the CAN national organization and were not CAN Local Affiliate brochures as alleged by Petitioners

b) The District Court found that the author of the CAN Manual of Surveillance was not a member of Local Affiliate Respondent CAN at the time of the Manual's preparation, and that this issue was not disputed by Petitioners. (CAN BR. P. 1-2).

But the record of the case indicates that Petitioners placed both the issues in a) and b) above in dispute. As such, the District Court erred in not presuming that Petitioners' version of the disputed facts was true in determining Summary Judgment, see: Eastman Kodak Co. v. Image Technical Services, Inc. 504 US 451 at 456; Anderson v. Liberty Lobby, Inc. 477 US 242 at 255; Adickes v. S.H. Kress & Co. 398 US 144

2. Rule 56 (f) FRCP; Continuance for Discovery

Petitioner CAN alleges that the District Court correctly exercised its discretion in denying a continuance of Summary Judgment proceedings to enable Petitioners to obtain Discovery since no specific Rule 56(f) affidavit requested it. (CAN BR. P. 3).

But the record of the case reflects that a Rule 56 (f)

continuance was specifically requested in a Sworn Affidavit to enable Petitioners to depose a material witness. Accompanying Sworn Affidavits in Opposition indicated why the witness was material and contained the four factors listed in Petitioners' Petition, Page 23, FN. 8.

The District Court erred since, "form is not to be exalted over fair procedures," when continuance of Summary Judgment is requested. See: Littlejohn v. Shell Oil Co. 483 F 2d 1140 at 1146.

CONCLUSION

Certiorari should be granted to Petitioners as representatives of a dissident religious organization.

REPLY TO BRIEF OF RESPONDENT HOWLETT

1. Mis-Statements of Facts

Respondent Howlett's brief is redolent with material misstatements of fact, namely:

a) Petitioners practice "a variant" of the Santeria religion (How. Br. ii). This is a self-serving statement, with no factual basis on record.

b) Respondent Howlett "cooperated" with Petitioners in Discovery. (How. Br. 1).

The reverse is true:

i) Respondent Howlett and his counsel (later of counsel) blocked all access to a material witness, whom Petitioners wished to depose to properly

oppose Summary Judgment. The District Court refused a continuation and granted Summary Judgment in favor of Respondent Cult Awareness Network. The record reflects that the material witness was a personal friend of both Respondent Howlett and his counsel (later of counsel).

ii) Respondent Howlett persistently refused to respond to Petitioners' interrogatories for identification of persons with knowledge or information of his affirmative responses for a 16 month period. A response was only made 11 days before Respondent Howlett's motion to dismiss which the District Court in error granted.

iii. Petitioners made documentary and interrogatory discovery to Respondent Howlett in August, 1992 (within 5 months of filing their claims, see Petitioners' Petition P. 15).

c) Petitioners willfully failed to provide documents or appear at their deposition as ordered (How. Br. 2). But Petitioners moved for Certification for an Interlocutory appeal against the Court's Discovery Order.

d) The Court's Discovery Order was "a carefully drawn order" which balanced the rights of the parties, (How Br. 3).

The reverse is true:

i) During the course of oral argument, the District Court made gratuitous remarks on record about a "disgusting cult" and deifying the "disgusting."

ii) The eventual "Order" consisted of a photocopy of a handwritten scrawl on the Blue Back of Petitioners' original motion to compel discovery and for a Protective Order.

iii) The handwritten order referred to rambling discovery directions contained in the transcript of oral argument on discovery and class certification which, inter alia, literally forced Petitioners to render their Class Certification Motion moot.

(See Petitioners' Petition, P. 20).

2. Core Issues Trivialized

a) Respondent Howlett seeks to trivialize the issues raised by Petitioners' Certiorari Petition as merely relating to discovery issues of no public importance. (How. Br. 3).

b) Respondent Howlett fails to address the core issue of whether the forced disclosure of membership lists of a dissident Plaintiff organization in class action proceedings to protect its membership against harassment by Defendants, effectively chills and abridges the Constitutional rights sought to be enforced.[1]

c) None of the cases cited by Respondent Howlett on discovery address this issue. (How. Br. P. 3). None of the cases deal with the disclosure of membership lists of dissident Plaintiff organizations seeking to protect their members from harassment by class action

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[1] The identities of 10 members who were previously harassed and individual Petitioners were known to Respondents.

certification to preserve membership anonymity against reprisals.

d) The record indicates that Petitioner Howlett was exposed to criminal liability under both State and Federal law for the use of his P.O. Box number on many of the 21 harassing letters.[2]

e) The ordered disclosure of the membership lists of Petitioner Church to Respondent Howlett, placed the entire membership at risk and effectively nullified Petitioners' legal attempts (by anonymity of a class action) to protect individual members from further harassment and violations of their First Amendment rights.

CONCLUSION

Certiorari should be granted to Petitioners as representatives of a dissident religious organization.

Respectfully submitted by

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Attorney for Petitioners

Dated: New York, New York
August 14, 1995

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[2] See: New York State Penal Law 240.30[1]; 18 USC 876 [Ch.41, Title 18, Sec. 876, Para. 3].